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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

22 Cr. 305 (JMF)

5 NATHANIEL CHASTAIN,

6 Sentence

7 Defendant.

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8 New York, N.Y.
9 August 22, 2023
10 2:30 p.m.

11 Before:

12 HON. JESSE M. FURMAN,

13 District Judge

14 APPEARANCES

15 DAMIAN WILLIAMS

16 United States Attorney for the
17 Southern District of New York

ALLISON NICHOLS

NICOLAS ROOS

18 Assistant United States Attorney

19 DAVID I. MILLER

DANIEL POST FILOR

20 Attorneys for Defendant

21 Also Present: Amelia Whitehead, FBI Special Agent

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(Case called)

THE DEPUTY CLERK: Counsel, please state your name for the record.

MS. NICHOLS: Good afternoon, your Honor. Allison Nichols and Nicolas Roos for the government. And with us is FBI Special Agent Amelia Whitehead.

MR. MILLER: Good afternoon, your Honor. David Miller and Dan Filor. And also at counsel table is the defendant, Nathaniel Chastain.

THE COURT: Good afternoon, everyone. Welcome back.

We're here for purposes of sentencing. Let me itemize what I have received and reviewed. First, the presentence report dated August 4th, 2023 and second the defense submissions dated August 8th and August 15th and August 21st of this year, as well as the attachment to the first of those submissions, namely letters addressed to me from the defendant's mother, girlfriend, parents of his girlfriend, his current employer and various other family, friends and current or past coworkers -- or I guess past coworkers -- as well as an Exhibit 2, I think it is, a Slack conversation. And the government's submission dated August 15th, 2023, as well as the attachment to that submission, namely the sentencing transcript in United States v. Wahi.

Are there any additional submissions that I should have received? Obviously, I presided over trial and therefore

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1 have that record that I'm familiar with. Anything else I
2 should have received?

3 MS. NICHOLS: No, your Honor.

4 MR. MILLER: No, your Honor. Thank you.

5 THE COURT: And I take it from the presentence report
6 that the victim here has been notified of this proceeding; is
7 that correct?

8 MS. NICHOLS: Yes, your Honor.

9 THE COURT: And I take it that they do not wish to be
10 heard; is that correct?

11 MS. NICHOLS: That's correct.

12 THE COURT: Mr. Miller, have you reviewed the
13 presentence report?

14 MR. MILLER: Yes, your Honor.

15 THE COURT: And have you discussed it with
16 Mr. Chastain?

17 THE DEFENDANT: Yes, your Honor.

18 THE COURT: Putting aside the guidelines for a
19 moment -- have discussion about that in short order -- any
20 objections or corrections to the factual recitation set forth
21 in the report?

22 MR. MILLER: None that weren't already reflected in
23 the PSR as our objections.

24 THE COURT: Thank you.

25 Mr. Chastain, have you reviewed the presentence

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1 report?

2 THE DEFENDANT: I have, your Honor.

3 THE COURT: Did you review it with your lawyers?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: Did you have enough time to do that, to go
6 over the report with them, to discuss any mistakes in the
7 report and anything more broadly that you wish to bring to my
8 attention in connection with your sentencing today?

9 THE DEFENDANT: Yes, your Honor.

10 THE COURT: Thank you.

11 Ms. Nichols, did you review the presentence report?

12 MS. NICHOLS: Yes, your Honor.

13 THE COURT: Again, focusing just on the factual
14 recitation, not the guidelines just yet, any objections or
15 corrections?

16 MS. NICHOLS: No, your Honor.

17 THE COURT: Hearing no objections, I will adopt the
18 factual recitations set forth in the presentence report, which
19 will be made part of the record in this matter and be placed
20 under seal. Counsel on appeal may have access to the sealed
21 report without further application to me.

22 That brings us to the guidelines. As counsel know,
23 I'm not bound by, don't have to follow the guidelines, per se,
24 but I am required to consider the applicable guidelines range
25 in imposing a sentence and must therefore accurately calculate

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1 the sentencing guidelines range. There are any number of
2 disagreements and open issues on this front. Let me address
3 some of them and hear from you on some of them.

4 Now, first, everyone appears to agree that the two
5 offenses are grouped pursuant to Section 3D1.2(c) and that the
6 offense level applicable to Count Two, namely the money
7 laundering charge, is the one to be applied here.

8 I take it that's correct, Ms. Nichols.

9 MS. NICHOLS: Yes, your Honor.

10 THE COURT: Mr. Miller.

11 MR. MILLER: Yes, your Honor.

12 THE COURT: Second, the parties both take issue with
13 probation's application of Section 2S1.1(a)(2), and I agree
14 with the parties that subsection (a)(1) applies, because
15 whichever guideline applies to the underlying offense -- and
16 we'll address that in a moment -- the defendant indisputably
17 committed the underlying offense and the offense level for it
18 can in my judgment be determined, so for that reason I agree
19 that the presentence report is wrong in applying subsection
20 (a)(2) and subsection (a)(1) should apply.

21 Now, that raises the question, which guideline applies
22 to the wire fraud offense. It's not clear to me that it
23 ultimately matters very much. Candidly, I don't think my
24 sentence will turn on it. But for what it's worth, I do agree
25 with the government that Section 2B1.4 apply because the

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1 gravamen of the offense conduct here is insider trading, that
2 is to say, misappropriation of confidential business
3 information to which Mr. Chastain was privy to by virtue of his
4 insider status and trading on that information. To be sure,
5 the offense conviction references Section 2B1.1, but
6 2B1.1(c)(3) where, quote, conduct set forth in the count of
7 conviction establishes an offense specifically covered by
8 another guideline in chapter two, that the Court is supposed to
9 apply that other guideline. Thus, by its terms, the focus is
10 on the conduct and here the conduct is indeed covered by 2B1.4
11 because it is trading on information obtained as an insider,
12 namely the confidential business information. So I agree that
13 2B1.4 is the applicable guideline.

14 Under that guideline, the base offense level is eight
15 and six points are added because the gain exceeded \$40,000.

16 Next, I do agree with the government that the abuse of
17 trust enhancement in Section 3B1.3 applies. I don't think
18 there's really any reasonable dispute of that, candidly. That
19 is to say, I think it squarely applies, contrary to the defense
20 argument that the enhancement is, if you will, baked into the
21 underlying guideline as application note two to 2B1.4 makes
22 plain, that is not the case, since the note itself explicitly
23 contemplates that the enhancement, the abuse of trust
24 enhancement should be applied in some cases subject to the
25 guideline, but not all. So that makes clear that it's not

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1 baked in. But the commission contemplated that it should be
2 separate and apart from 2B1.4.

3 And finally, I think there's no dispute that two
4 points are added under Section 2S1.1(b)(1)(B) because
5 Mr. Chastain was convicted under 18, US Code, Section 1956.

6 That results in 18 points.

7 The only other issues, one is flagged by my order this
8 morning, namely whether 2S1.1(b)(3) applies, that is a two
9 point enhancement for, quote, unquote sophisticated laundering.

10 Does counsel wish to be heard on that?

11 MR. MILLER: Yes, your Honor.

12 So, your Honor, a couple points. Obviously, with
13 preserving all of our other arguments, of course, with respect
14 to 2S1.1(b)(3), we don't think this enhancement should apply.
15 If your Honor, of course, looks at even referencing 2B1.1 on
16 sophisticated means and all the arguments that are made in the
17 commentary, this is not a case in which mixers or tumblers or
18 other efforts to conceal and obfuscate were used. In fact, to
19 the extent that anybody would argue that because it involves
20 particular technology, meaning the blockchain or crypto, that
21 it must involve sophisticated means, under 2S1.1, sophisticated
22 laundering, that would then apply to literally every case that
23 involved the blockchain or crypto. So as a threshold matter,
24 we think that argument obviously fails. Just because there
25 were transfers on a blockchain doesn't mean all of a sudden

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1 there was sophisticated laundering.

2 There's nothing particularly complex here with what
3 happened, particularly given the fact -- and notably given the
4 commentary to 2S1.1(b)(3) -- that in fact any transfers that
5 occurred among wallet addresses here is, our recollection,
6 from -- including from the government exhibits -- showed those
7 transfers occurred before the purchases of the NFTs were made
8 and that the proceeds that transferred to the hot wallet, the
9 MetaMask wallet -- there's different addresses within the
10 MetaMask wallet -- to the cold wallet. So ultimately, what
11 we're talking about here is whether or not the mere transfers
12 from the platform to one's hot wallet to one's cold wallet
13 would constitute sophisticated laundering. That, again, going
14 back to the technology involved here, would involve most cases
15 that involved blockchain and cryptocurrency. Because most
16 people who are engaging in trading on the blockchain are going
17 to have some kind of either hot wallet, cold wallet or both in
18 interacting with the platforms, particularly in crypto exchange
19 platforms.

20 So ultimately, what you are talking about here are
21 different wallet addresses, that as your Honor probably recalls
22 from the trial, Dr. Edman testified about and indicated in his
23 expert opinion, which is consistent with practice, that in fact
24 what people usually do is they create multiple wallet addresses
25 within their hot wallet, their MetaMask wallet in order to keep

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1 track of cryptocurrency and for tax purposes, as well as other
2 organizational purposes.

3 So there's nothing particularly sophisticated here
4 that's within the application note of 2S1.1(b)(3) and the
5 commentary. So we don't think this should apply. It certainly
6 shouldn't apply just because we're talking about blockchain
7 technology or because we're talking about the fact that there
8 was a hot wallet and a cold wallet. That's our general
9 position, your Honor.

10 THE COURT: Ms. Nichols.

11 MS. NICHOLS: The government does not think that that
12 enhancement applies here either, just based on the application
13 notes and the description of the kind of conduct that is
14 contemplated by that enhancement.

15 THE COURT: Well, I suppose I could have started with
16 the government. In any event, I will not apply the guideline.
17 I think it's a slightly closer question, which is what prompted
18 me to include it in the order, only given application five to
19 the guideline, which provides examples, one of which is two or
20 more levels of transactions, transfers or transmissions and
21 there, at least, I think, if I remember correctly, some
22 transactions here in which multiple wallets were used in an
23 effort, I think, to conceal the transactions or at least
24 Mr. Chastain's connection to them. But be that as it may,
25 since the government doesn't seek it and I think it's a close

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1 call and not clearly applicable, I will not apply it.

2 Now, nor will I reduce the offense level for
3 acceptance of responsibility. I read the defense argument.
4 Candidly, I don't think it's a close call. Yes, Mr. Chastain
5 conceded certain elements of the offenses at trial, that is to
6 say, he didn't dispute things that I think were really not
7 reasonably disputable, such that he engaged in the
8 transactions. But he fundamentally disputed and continues to
9 dispute his factual guilt, that is to say, whether he did
10 anything wrong, whether the information here was confidential.
11 And in that regard, I don't think that he's entitled to
12 acceptance of responsibility credit.

13 To the extent that the defense points to the Slack
14 chat in Exhibit 2 or whatever the case may be, I don't find
15 that particularly persuasive. At that point, the jig was up,
16 he had been caught, he knew he was not going to be employed at
17 OpenSea any longer. The fact that he was permitted to resign,
18 as opposed to being fired, is neither here nor there. To me,
19 the more significant conduct was before, when the initial Tweet
20 came out about it and he was confronted by Mr. Viau and
21 Mr. Atallah, and not only did Mr. Chastain not admit his
22 conduct, but he actually lied about it. So more to the point,
23 I don't think that his conduct throughout this litigation can
24 reasonably be described as accepting his responsibility for his
25 conduct. Yes, he doesn't dispute all of it, but that's not the

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1 standard. He doesn't accept his factual guilt. He continues
2 to maintain his innocence, which he's certainly entitled to do.
3 But he's not entitled to do that and get credit for acceptance
4 of responsibility. So I will not reduce it for that.

5 That yields a total offense level of 18.

6 For what it's worth, I don't think we need to go
7 through the exercise of how the guidelines would be calculated
8 under 2B1.1. But it is certainly conceivable that it would
9 be -- whatever the calculation would be roughly equivalent
10 somewhere -- either 17 or 19, depending on whether the
11 sophisticated means enhancement applies -- but because I don't
12 think we need to go through that exercise and whether the
13 offense level is 17, 18 or 19, I don't think it would affect my
14 sentence and it doesn't ultimately really matter.

15 So all that is to say, based on what the parties do
16 agree on, based on my resolution of the disagreements and the
17 parties' objections, based on my independent calculation of the
18 guidelines, I find that the total offense level is 18, the
19 criminal history category is I, and the guidelines range, in is
20 using the November 2021 edition of the guidelines, which is
21 currently still in effect, is 27 to 33 months' imprisonment
22 with a supervised release range of one to three years and a
23 fine range of 10,000 to \$500,000.

24 That said, I will, consistent with the parties'
25 agreement and what I've done in other cases, I do plan to and

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1 do apply the proposed zero point offender amendment to the
2 guidelines that, absent congressional action, will go into
3 effect in a matter of months, so that would result in an
4 offense level of 16 and a guidelines range of 21 to 27 months.

5 Anything further on that?

6 Obviously, the defendant has preserved his objections,
7 as set forth in the sentencing submission. Anything further
8 from the government on the guidelines calculation?

9 MS. NICHOLS: No, your Honor.

10 THE COURT: Mr. Miller.

11 MR. MILLER: No, your Honor. We preserve our
12 objections.

13 THE COURT: Does either side believe there is a basis
14 for departure that is within the guidelines system and distinct
15 from what has become to be known as a variance?

16 Ms. Nichols.

17 MS. NICHOLS: No, your Honor.

18 MR. MILLER: We have a number of 3553(a) arguments.

19 THE COURT: Understood.

20 But no departures, that is, within the guidelines
21 system?

22 MR. MILLER: No.

23 THE COURT: I nevertheless have considered the record
24 and also agree that there's no basis or need for a departure,
25 which is distinct from what has come to be known as a variance.

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1 With that, I will hear first from the government then
2 from defense counsel and then from Mr. Chastain, if he wishes
3 to say anything before I impose sentence.

4 I did, as you know, pose some questions in my order of
5 earlier today. To the extent that they pertain to the
6 guidelines, I think we have already covered them and you don't
7 need to address them. But I will want you to address the
8 others, namely whether there are any insider trading, in
9 quotes, cases involving as little loss or gain as that involved
10 in this case, and the questions that I posed about forfeiture,
11 that is to say, dollars and conversion amounts and timing
12 questions on that front.

13 So let me begin with the government. And I may pose
14 some additional questions beyond those, but I'll start with
15 you. I do want to stress, obviously, I presided over trial and
16 am obviously quite familiar with the record here and have read
17 your very helpful and thorough sentencing submissions, so you
18 don't need to reiterate things I would already know, but
19 anything you think I ought to consider you are welcome to
20 share.

21 Go ahead.

22 MS. NICHOLS: Thank you, your Honor.

23 I'll try to be brief and try to be focused on what the
24 Court is most focused on based on the order this morning. I
25 think the Court's question about small gain amounts is

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1 consistent with how the government has been trying to think
2 about comparable defendants who have been sentenced in recent
3 memory before the court. And we tried to find specific answers
4 to the Court's question.

5 And there are a few cases in the insider trading
6 context where the insider, the tipper, actually makes no money
7 at all. And so their guidelines calculation ends up baking in
8 a gain or loss amount that's attributable to the downstream
9 tippees, but I think those folks would be -- in direct answer
10 to the Court's question -- insider trading defendants who made
11 nothing, so --

12 THE COURT: But I don't think those are the right
13 comparators, because there is a loss in those cases, the people
14 who traded without the benefit of that inside information. So
15 it may be that the profit, if you will, is yielded by the
16 tippee rather than the tipper, but under the guidelines and the
17 principles of criminal liability, the tipper is accountable for
18 that.

19 I think here -- I'll be blunt -- my question is posed,
20 in part, for the following reason: Having spent eight or nine
21 years in the US attorney's office, having spent 11 years on the
22 bench, I genuinely wonder, but for the fact that this raised in
23 a slight sexy, new arena, NFTs, whether it would have been
24 charged if it were insider trading and yielded only \$56,000 in
25 profits. If not -- I'm not saying the defendant should be let

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1 off scot-free, I think the jury's verdict was an absolutely
2 defensible one -- it strikes me as a relevant consideration
3 that under other circumstances, in another arena the defendant
4 might not even have been charged with a crime.

5 MS. NICHOLS: So I think just three things in
6 response, your Honor. We're not quibbling with the Court's
7 assessment that, typically, at least in this district, the loss
8 amounts in insider trading cases tend to be more eyebrow
9 raising, but that does not mean that lesser amounts are not
10 criminal in nature and I think that there is no sort of de
11 minimus exception to the applicability of the law.

12 THE COURT: I'm not suggesting there is. But it
13 certainly matters for evaluating culpability and sentencing
14 exposure. So no question, I don't intend to quibble with the
15 jury's verdict in this case at all, there was no motion to
16 review it, but I probably would have denied any such motion,
17 because I think the jury certainly reached a defensible
18 verdict. I'm not suggesting there is a de minimus exception.
19 I'm not suggesting that he shouldn't have been charged, that's
20 not my prerogative. It does strike me as a relevant question.

21 MS. NICHOLS: Let me round out my response, your
22 Honor. I understand why the Court is asking the question.

23 I think the second thing that I'll say is that a lot
24 of times the loss amount becomes -- or the gain amount,
25 rather -- becomes a really pivotal topic at sentencing, in

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1 particular because of the way the guidelines end up really
2 tracking that number. And I think in this district, in
3 particular, there's often a significant haircut off of the
4 guidelines because of a perception that the actual wrongdoing
5 associated with the crime is the misappropriation of the
6 information. And the degree of loss or gain is somewhat
7 incidental to the wrongful conduct. And just as in this case,
8 I think, Mr. Chastain had no way of knowing ex ante whether the
9 featuring of the CryptoPanda NFT versus the Focus NFT would
10 trigger a tenfold increase in the value of that token versus a
11 twofold increase. And I think that to get extraordinarily
12 focused on the gain amount is actually, I think, a little bit
13 incidental to the core purposes of sentencing when looking at
14 the 3553(a) factors.

15 The third point that I'll make, your Honor -- this
16 tied into something I wanted to address earlier -- we have
17 talked at the onset of this case about whether it's a novel
18 prosecution theory. Defense counsel has emphasized that and
19 emphasized it to the jury and emphasized it in legal arguments
20 to the Court. And I think, from the government's perspective,
21 I think this cuts the other way. I think that what we see from
22 Mr. Chastain's conduct is that he perceived a gray area and he
23 exploited it. And I think that's why actually a serious
24 sentence that focuses on the misappropriation of confidential
25 information by an insider versus what is this industry or what

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1 is the loss amount is really the thing that the government
2 thinks that the Court should be focused on at sentencing and
3 for the purposes of the 3553(a) factors.

4 THE COURT: I think both sides sort of missed the
5 point a little bit in stressing the novelty of this case. I
6 know the defense has done that from the outset in suggesting
7 that it's therefore not a crime. To me, as I think I have said
8 from the outset, this case falls squarely in the Carpenter box
9 and it just happens to arise in a new arena involving slightly
10 sexy assets. But it could just as well been a box store where
11 the decision to put something in the window elevated the price
12 and he happened to trade on that. It was more atmospheric than
13 it was central to the case. Having said that, I think, as the
14 trial made clear, the key question was whether OpenSea did
15 consider and treat development information as business
16 information. I think the jury's verdict on that was a
17 defensible one, but there were certainly arguments that the
18 defense did make and could make on that score, most notably
19 that Mr. Finzer hadn't even thought about the information until
20 it came to light that Mr. Chastain was trading on this. The
21 quote, unquote Clerky form, I think everybody will agree, while
22 I think the jury was on firm ground in concluding that this
23 information fell within the definition of confidential
24 information and that Mr. Chastain knew that, as reflected by
25 his own conduct, there's no question it wasn't a very well

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1 lawyered form and the company didn't have policies on these
2 issues until his conduct came to light. As you know, they
3 changed them. There was no training on the issue. It was a
4 little bit of a wild west situation. That isn't to say he can
5 commit a crime. I think his own conduct revealed that he
6 understood he was doing something untoward. But it does
7 suggest that -- I mean, I guess my question is: Where the
8 victim of the crime itself, as reflected by Mr. Finzer most
9 notably, didn't consider it to be insider trading -- if I
10 remember that interview -- where he referred Mr. Chastain to
11 one of the primary investors of OpenSea within weeks for a job,
12 where he invited him to his birthday party within weeks of his
13 resignation, that's not the kind of way that a victim typically
14 acts to someone who has violated their trust and committed a
15 crime. How should that weigh in here? Which is not to say
16 that he didn't commit a crime, it's just to say that the victim
17 itself didn't perceive this to be such an egregious breach that
18 he wouldn't recommend him for a job, for example. I realize I
19 just said a lot of different things, so address what you want
20 in there.

21 MS. NICHOLS: Sure. Thank you, your Honor.

22 So I think as to the comment that OpenSea was a wild
23 west and didn't have sort of like more grownup type policies,
24 procedures, trainings for its employees until after the fact, I
25 mean, I take the Court's point, because it goes squarely to how

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1 did OpenSea protect the information, that's important. But I
2 think it's important also that courts not penalize, if you
3 will, a company for being a startup.

4 This company was growing. It was growing very
5 quickly. And as we point out in our submission, the category
6 of confidential information that Mr. Chastain misappropriated
7 did not exist at the time that he signed the so-called Clerky
8 form. So I think that is how I understood Mr. Finzer's remark
9 that he hadn't thought about this ahead of time.

10 And I think that Mr. Atallah maybe spoke about it in a
11 way that was a little more thoughtful, perhaps, insofar as he
12 referred to it as an umbrella policy, it was meant to capture
13 all of the confidential information that a person could -- the
14 nonpublic information that an employee would learn through the
15 course of his employment. I think that is what the form said.
16 That is what Mr. Chastain agreed to.

17 So I think that the fact that it was only later that
18 OpenSea got a head of HR, it only later they got a GC, it was
19 only later they started doing formal training and onboarding
20 for employees, I don't think that should suggest that they
21 didn't take confidentiality seriously and that they weren't
22 trying to protect their confidential information. It's just
23 that a company that has 200 employees is necessarily going to
24 do that differently than a company that has ten employees.

25 THE COURT: Can you focus on the second part of my

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1 long remarks, that is to say, really focusing on Mr. Finzer
2 more than anyone, that his reaction to learning about
3 Mr. Chastain' conduct, that is to say, yes, I think it's clear
4 from the testimony that he felt that there had been a violation
5 of trust, yes, he felt that he needed Mr. Chastain to resign or
6 be fired. But at the same time, he described it as the most
7 difficult thing he had to do, at least up to that point in his
8 experience at the company -- more to the point, he recommended
9 him for a job with one of the primary investors or at least
10 connected him to that person, he had him at his birthday party,
11 he said he didn't consider it to be insider trading, I don't
12 know if it went beyond that. Can you describe what impact, if
13 any, that should have.

14 MS. NICHOLS: I'm not sure it should have any impact,
15 your Honor. I think that Mr. Finzer and Mr. Chastain were
16 friends and I think that the fact that Mr. Finzer found this
17 entire situation extraordinarily difficult on a personal level
18 was very clear. I do not think that Mr. Finzer is aware of the
19 Carpenter line of cases and his opinion that this is not
20 insider trading is worth nothing. And I think, in context, his
21 comments were related to the fact that his understanding of
22 insider trading was that it is about securities and NFTs are
23 not securities.

24 THE COURT: What about the reference to the Coinbase
25 member of the board, investor, whoever he was? That, to me, is

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1 definitely an odd case, where the victim doesn't feel
2 victimized, right, prosecutors are prosecuting this case. The
3 victim is not seeking restitution. I agree with you there's
4 loss and certainly there's gain and 2B1.4 applies, doesn't
5 matter. It's not a legal issue, but as just --

6 MS. NICHOLS: As a philosophical matter, your Honor,
7 it's my view and I think this office's view in a lot of
8 circumstances that the feelings of the victim do not matter.
9 And where this comes up a lot, at least in my docket is --

10 THE COURT: I don't think that's the position of the
11 United States government with respect to prosecutions generally
12 or consistent with the Crime Victim's Rights Act, which says
13 these victims absolutely do matter and need to be reasonably
14 heard --

15 MS. NICHOLS: Yes, your Honor.

16 THE COURT: -- except where the victim doesn't want to
17 be heard.

18 MS. NICHOLS: Victims absolutely need to be consulted
19 at various points consistent with the law and with the justice
20 manual, your Honor.

21 But what I'm trying to say is that if a victim does
22 not subjectively feel victimized, that does not mean that a
23 prosecution is inappropriate and it does not mean that this
24 office declines prosecution.

25 And this happens a lot in domestic violence cases that

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1 have come before the federal court on VOSRs on a very frequent
2 basis. And these cases are declined in state court. And
3 oftentimes, federal court is the only game in town for
4 prosecuting those kind of crimes where very frequently the
5 victim does not want any part of it and for reasons that are I
6 think a lot more complicated than the ones we have here.

7 I think the fact that Mr. Finzer recommended
8 Mr. Chastain or offered to put him in touch with a third party
9 immediately after -- and I could be mistaken, I think that was
10 immediately after -- he was fired, but before the prosecution
11 was brought, I think that speaks to his personal affection for
12 the defendant, which I think is something that the Court can
13 and should consider in the 3553(a) factors, insofar as the
14 defendant was liked by his colleagues. And he has family
15 support. I think that's reflected in sort of the many Slack
16 communications that we have reviewed and we put into evidence.
17 I think that there's no question that he had the affection and
18 the support of his colleagues. But I do think that that is
19 separate from the offense conduct. And so I don't think that
20 it minimizes the crime. I think it may be something that the
21 Court can separately take into consideration when looking at
22 the whole person as the law suggests that you do.

23 THE COURT: Other than forfeiture, I don't have any
24 other questions, but anything else you wish to say, aside from
25 addressing the forfeiture issues?

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1 MS. NICHOLS: I think I won't reiterate anything in
2 any detail that we put in our submission. I know the Court
3 said that it read it and doesn't have any other questions. I
4 just think what we would like to emphasize is that a
5 significant sentence is important for both specific and general
6 deterrence here. The novel, so-called novel nature of this
7 case, I think, as I said, actually cuts the other way. What we
8 have here is, in many ways, the same kind of white collar fraud
9 that we're seeing in other contexts. And the fact that it is
10 in a different context, pertaining to NFTs, it is on the
11 blockchain does not warrant a lesser sentence or any kind of
12 leniency. We think that a sentence within the guidelines is
13 appropriate.

14 As to the forfeiture, the Court has two questions,
15 which I think are sort of four questions. I think that we
16 addressed the question of which transactions should be applied
17 in our sentencing submission. The instances where the
18 defendant was trading after the NFT had been featured were
19 minutes afterwards, and so I think that there's no real --

20 THE COURT: Let me press you on that. I think you
21 have a tough road to prevail on that one for two reasons. One
22 is, at trial, the government took the position that certain
23 transactions -- and distinguished Mr. Chastain from a colleague
24 of his, who had traded on something minutes after an NFT was
25 posted -- and your colleague who is not here today, I think,

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1 literally argued to the jury that that's not a problem because
2 it had already been made public at that point, taking the
3 position that once it is featured and public it's not a crime,
4 I think it is a little hard to now say those should be treated
5 as a crime. Second, how is it nonpublic information, once it's
6 posted on the website and available to the entire world in an
7 instant? I mean, theoretically, somebody who is doing -- I
8 don't know if there's high frequency trading -- one could have
9 it set up where the moment something is posted on OpenSea, they
10 instantaneously buy and then trade on it. It's not public
11 anymore. So in that regard, it may be as a practical matter,
12 they posted things and then a minute later bought them, there
13 is a query whether he would have been charged with a crime and
14 may well have made the same profit, I'm not inclined to include
15 those transactions in the forfeiture amount. I don't know how
16 hard you want to fight me on that, but you have a hard battle
17 to prevail.

18 MS. NICHOLS: I can move on, your Honor.

19 THE COURT: Okay.

20 MS. NICHOLS: If we just look at the transactions that
21 occurred pre-feature, the profit is \$50,000, \$50,113, and that
22 is converting the ETH at the time of the transaction into
23 dollars. If we don't do the conversion, the total ETH is 15.9
24 for those pre-feature buys.

25 I need to say one more thing about how we get there.

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1 We used a convention -- where there are some transactions prior
2 to featuring and some transactions after featuring, in order to
3 make the distinction, we used a first-in, first-out comparison.

4 THE COURT: Okay. Can you address the ETH versus
5 conversion into dollars question. In other words, if he has
6 never liquidated the ETH and still has it, is that not the
7 property derived from the offense, and should the forfeiture
8 not just be the ETH, would that not be the most straightforward
9 way to do it? And I would point you rely on the Wahi
10 sentencing as a comparator, the forfeiture was with respect to
11 the crypto involved, not a converted amount.

12 MS. NICHOLS: That's true, your Honor. And I think
13 it's hard to argue that what you are suggesting is the simplest
14 way, I think the --

15 THE COURT: Hard to argue it is or --

16 MS. NICHOLS: You are right, you are right, your
17 Honor, that what you are saying is straightforward, just to
18 take the ETH, if that's how the Court is inclined to do it, I
19 think the number is 15.9 ETH.

20 I think our view on that is that with analogy to the
21 McDonald case in the securities world, the defendant choosing
22 so keep his investment in ETH, it's actually a separate
23 investment decision that he has made. And why he did that, I
24 don't think anyone would know. But I think it's fair to
25 surmise that, at the time, that he thought that ETH was going

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1 to keep going up. As it happens, ETH has tumbled and it's now
2 worth about half as much as it was. But I think that our view
3 is that it is appropriate to measure his gain at the time of
4 the transaction, which is significantly greater than it is some
5 years later when he has held and there have been all these
6 other market forces.

7 THE COURT: Can I ask you a question on that. I would
8 presume that, if the ETH had skyrocketed since the transaction
9 and was now worth 3X what it was at the time, that you would be
10 here arguing that he should be required to forfeit the ETH
11 itself, even though it has appreciated in value, that all of
12 that is traceable to the crime, and I think there's case law
13 that supports that. Is it a one-way ratchet, where the
14 government gets to choose the point in time and pick the most
15 valuable point?

16 MS. NICHOLS: I think that what distinguishes this
17 from the McDonald case and the securities cases is that there's
18 actually sort of two ways to measure what the thing is. So he
19 sold the NFTs and he took his gains in ETH. And then he could
20 have -- but didn't -- but he could have chosen to convert to
21 dollars. So I think the question is whether it's appropriate
22 to give him the benefit, so to speak, of having chosen to
23 maintain an investment in ETH after the fact.

24 My colleague is pointing out that the purpose of
25 forfeiture is to prevent the defendant from getting and

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1 maintaining ill-gotten gains, to think of it as one
2 directional, such that he is not being put in the position to
3 benefit from the crime.

4 THE COURT: Okay. Anything else?

5 MS. NICHOLS: No, that's it from the government, your
6 Honor. Thank you.

7 THE COURT: Mr. Miller.

8 MR. MILLER: Thank you, your Honor.

9 Would you prefer here or at the podium?

10 THE COURT: Up to you, as long as you speak into a
11 microphone.

12 MR. MILLER: I'll stand here, your Honor.

13 I have a number of responses to your Honor's questions
14 and points and I thought if it was okay with your Honor, rather
15 than jumping around, I would do it in the context of my 3553(a)
16 analysis.

17 Let me begin, if I might, your Honor, by introducing
18 you to Nate Chastain's friends and family that are here with
19 him today. I think, primarily in the first and second rows,
20 you have Donna Chastain, Mr. Chastain's mother; you have
21 Elizabeth Sherman, Mr. Chastain's girlfriend; you have Ron
22 Criscetiello, Mr. Chastain's mother's boyfriend; you have
23 Kachina Studer, Mr. Chastain's friend; you have Harrison Hines,
24 Mr. Chastain's former CEO at Token Foundry and friend; and I
25 believe you also have Royce Moroch, who is a former coworker.

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1 Your Honor, there are a number of issues that I want
2 to walk through with respect to 3553(a). I, of course, am
3 aware that your Honor has reviewed closely --

4 THE COURT: Before you do that, let me welcome all
5 those people, many of whom submitted letters to me and I read
6 and appreciated. If I could ask, Mr. Miller, when this is over
7 to give the court reporter spellings of those names, that would
8 make sure the record is accurate.

9 MR. MILLER: Absolutely, your Honor.

10 THE COURT: Go ahead.

11 MR. MILLER: Thank you, your Honor.

12 There's a few points I want to highlight, the most
13 important points under 3553(a). And in the context of doing
14 that, address some of the points you raised, some of the points
15 you just raised to government's counsel. And the Court is
16 obviously well aware of the factors, I'm not going to waste
17 everybody's time going through what the factors are. But I do
18 want to say a few things about each factor that show that a
19 nonguidelines, noncustodial sentence is appropriate here.

20 Let me begin with Mr. Chastain's personal history and
21 circumstances. At every stage of life, Nate Chastain has
22 demonstrated his extraordinary devotion to and concern for
23 others. And many of the letters of support that were submitted
24 to your Honor illustrate that, whether he's lending a hand to
25 those in need, supporting friends through times of tragedy,

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1 contributing to charitable efforts, serving as a mentor to his
2 coworkers, dedicating time to building useful products for
3 people, and stepping up, frankly, for his family, not only in
4 the aftermath of his father's Alzheimer's diagnosis, but also
5 in the wake of his brother's recent suicide. And this, of
6 course, was all happening, as your Honor is well aware, as he
7 was being prosecuted and tried in this court. We have been
8 honored, frankly, your Honor, to represent such a kind,
9 compassionate, intelligent, respectful and caring person. I
10 think I speak for our entire team on that front. And frankly,
11 it doesn't always go that way, your Honor, where we're
12 representing people of such caliber as Nate Chastain.

13 Nate's upbringing was defined by education and hard
14 work. Now, as we discussed in our sentencing submission, he
15 had a difficult family upbringing, but he was fortunate to
16 attend some good schools, both at the prep school level, then
17 ultimately in college. But he went on to earn his bachelor's
18 degree and engage in hard work. Since graduating from college
19 in 2015, he's worked in the tech and crypto industries,
20 including several companies that we have list in our sentencing
21 submission and I know your Honor has reviewed and for those
22 companies, people have submitted letters in support from those
23 companies, as well as even attending today.

24 Nate Chastain's life has been marked, as I sort of
25 previewed earlier with acts of generosity and kindness, and the

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1 letters exemplify that. Nate's former colleagues at Consensus,
2 people talk about what he did for them as a mentor and helping
3 people who were in danger of being fired. His generosity and
4 kindness and charitable efforts even extend beyond the
5 workplace, as we saw from letters like from his friend from
6 college that provided help, money that Mr. Chastain gave in
7 support for promotions for cancer research, and even one person
8 who described how he's always willing, always willing to go out
9 of his way for someone else at any time, not just when it's
10 convenient. And I think these letters speak volumes, because
11 sometimes we see, your Honor, in sentencing submissions where
12 you have 30, 40, 50 letters, but they're not of substance. The
13 16 or 17 letters that were submitted with this sentencing
14 submission are of substance and demonstrate the kind of person
15 that Mr. Chastain is.

16 And frankly, it's not just a matter of his friends or
17 colleagues, work colleagues, people from school, his family
18 echos this sentiment. Nate's uncle described how Nate Chastain
19 helped him with his drunk driving prevention campaign. Other
20 people talked about how he helped them avoid expenses,
21 particularly during hard times. And he's so generous. It
22 wasn't like he had so much money to begin with. His sister
23 talks about the time and the many nights that he spent helping
24 her, particularly with homework and other endeavors. And
25 frankly, in times of unimaginable hardship, Mr. Chastain has

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1 selflessly put the needs of his friends and family above his
2 own, your Honor.

3 I referenced, obviously, his father's Alzheimer's
4 diagnosis and what he's been doing, even during this
5 prosecution, when he's been going back to Massachusetts to help
6 his mother, to help his sister. As your Honor is well aware,
7 tragically, Mr. Chastain's younger brother, who previously
8 suffered life-threatening injury at work and who had a long
9 history of mental illness committed suicide in February of this
10 year. And Mr. Chastain immediately and without question,
11 without any issues took on the responsibility of planning all
12 aspects of his brother's funeral services. And I remember
13 this, your Honor, as we were preparing for trial in February.
14 And he did everything to help his family, his mother, his
15 sister be able to grieve.

16 I'll note too that five years ago, his college
17 roommate tragically took his own life. And one of the letters
18 that we appended to our submission speaks about how
19 Mr. Chastain helped friends, including at the funeral, and did
20 what he needed to do and gave up himself, notwithstanding the
21 grief that he felt, to help other people and put other people
22 at ease.

23 This is a man, your Honor, who has stepped up in life
24 for everyone. And I think that is extremely important to note
25 as part of a 3553(a) assessment.

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1 To that end, your Honor, the instant factual
2 conduct -- and your Honor is of course aware that we're
3 preserving certain arguments, but in terms of the conduct that
4 was done, namely the trading, we haven't contested that -- we
5 still submit this is an isolated misstep in Mr. Chastain's
6 life. Before this case, as your Honor is well aware,
7 Mr. Chastain had never been arrested and there is zero
8 indication that he is a person capable of repeating the conduct
9 at issue, which in all respects, all respects was an anomaly on
10 his record.

11 We note that obviously this is a relatively young man,
12 33 years old. He has engaged in those young years in immense
13 character building, immense charitable actions, and as I just
14 recited, the kind of guy who will help everybody at the drop of
15 a hat.

16 Now, if I may, your Honor, talk about the nature and
17 circumstances of the offense here. The factual conduct
18 obviously took place over a relatively short period in 2021.
19 As probation agreed with us in their computation, it inflicted
20 no monetary losses on the supposed victim, OpenSea, and
21 resulted in minimal gains. Your Honor actually already raised
22 some of the points that I was going to raise about what
23 actually happened here and most importantly OpenSea's response.

24 I understand your Honor's point about the Court's
25 belief that this case falls squarely within Carpenter and that

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1 the jury made its assessment and convicted him of wire fraud
2 and money laundering, I'm not here to quibble about the jury's
3 verdict, certainly not. But I think your Honor made an
4 important point at the very beginning of government counsel's
5 argument that I was going to make, your Honor, and that is I
6 too wonder if this case would have ever been brought if this
7 didn't involve non-fungible tokens and blockchain. That's not
8 an irrelevant point for 3553(a) purposes, especially
9 considering that the gain amount here -- to the extent there
10 was a gain under the guidelines -- is, depending upon how you
11 compute it, 50 grand or even as low as 23 grand. I'm not
12 suggesting that because somebody commits a crime and it's
13 little money that it's not important. I'm not saying that,
14 your Honor. I am saying for assessing what constitutes a
15 reasonable sentence in this proceeding that absolutely should
16 be considered. Because I think the real answer to your Honor's
17 question about whether this case would have ever been brought
18 is no. And again, I respect the jury's verdict and the Court's
19 opinion of what's going on here. But nevertheless, I think
20 that must be considered in fashioning an appropriate sentence
21 under 3553(a).

22 I was a little surprised at government counsel's
23 defense of Mr. Atallah's testimony but equivocation when it
24 came to Mr. Finzer's testimony when talking about the nature
25 and circumstances of offense here and the level of culpability.

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1 The jury certainly was asking questions, and they did bring up
2 Mr. Finzer's testimony in their jury questions. They certainly
3 didn't bring up Mr. Atallah's. And obviously, our arguments
4 were presented in our closing argument about Mr. Atallah's
5 testimony and the value of it and I need not repeat those. But
6 I think it's important to note, with respect to Finzer exactly
7 what the Court has already said, and I need not repeat it. But
8 I think your Honor hit the nail squarely on the head as to what
9 Mr. Finzer, the signatory of that Clerky form, and what OpenSea
10 thought about the conduct here.

11 So I would also like to point out that the government,
12 in its submission, describes this as a serious case because
13 Mr. Chastain stole, I think they used the word, corporate
14 secrets, making this sound like a typical insider trading case.
15 It is anything but. As we argued at trial, there was no
16 commonly known rules and policies here, and I'm not going to go
17 in depth on that, your Honor has already referenced that in
18 your colloquy today. The secrets at issue were something that
19 were devised by Mr. Chastain in his head, which NFTs to
20 feature, and to keep the website looking nice and ever
21 changing. And there was no training, and we talked about that.

22 But I think it's also important to note, in terms of
23 the trades that were involved here, obviously, these were
24 issues about arbitrage with respect to small gains.
25 Mr. Chastain did not believe that he was defrauding OpenSea or

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1 that the conduct was criminal. But most importantly, if you
2 look at when these trades occurred -- this was something we
3 referenced in closing, and I think it is important to consider
4 from a 3553(a) perspective, there was a trade in June that was
5 one of the trades that was charged here, and that was what we
6 call a straddle trade, where some of it was before it was
7 publicly available, others after, some of the items. And then
8 there were the two July trades, which were made after the NFT
9 was featured on the home page. And then on August 2nd of 2021,
10 there was the Twitter blast to over 10,000 followers, including
11 people at OpenSea, where Mr. Chastain admitted buying pre-NFT
12 feature, but nobody objected to that, nobody took him to task
13 for that. So certainly, an argument could be made, your
14 Honor -- just talking about now from a 3553(a) perspective --
15 is what we're dealing with is the conduct in June, which
16 amounted to approximately \$800. Again, I'm raising this just
17 for the purposes of the nature and circumstances of the
18 offense.

19 I'll end on this particular fact by saying it's not
20 fair for the government to say this case is just as serious as
21 sort of the run of the mill insider trading case, where the
22 rules of the road were not known, this was, to use your Honor's
23 words, the wild west at OpenSea. And putting aside the guilt
24 or innocence under the counts, clearly, these facts must go to
25 the level of under culpability under 3553(a).

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1 Now, let me say a few things --

2 THE COURT: Can I stop you there. And I recognize
3 that you are drawing a little bit from the comments that I
4 made, but I think partially what I was saying was that was what
5 made this case a triable case. I think the jury's verdict was
6 totally defensible, notwithstanding the company was not fully
7 formed, developed, lawyered, what have you, I think the jury
8 reached a totally defensible verdict, this was confidential
9 business information, given the definition, given the term
10 confidential in the, quote, unquote, Clerky form, and frankly,
11 most notably in the context, which made it quite clear that he
12 treated it as confidential and took substantial steps to
13 conceal what he was doing from his employer and from the
14 public. So I understand -- I mean, you made those arguments,
15 the jury rejected them. In that regard, it gives me pause and
16 concern that to this day -- I understand you want to want to
17 preserve arguments for appeal, and that's totally fine -- I did
18 not give acceptance of responsibility credit. It's troubling
19 to me that, sitting here today, you or Mr. Chastain through
20 you, continue to maintain he didn't do anything wrong and
21 everything was unclear and there was ambiguity here and so
22 forth. That's not how I view his conduct and certainly not how
23 the jury took his conduct. So what should I make of that?

24 MR. MILLER: Your Honor, I apologize if your Honor is
25 taking that a way, that's not what I'm saying. Mr. Chastain is

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1 going to read a statement in which he talks about how he
2 thought and that he thought that he shouldn't have done what he
3 did, as he admitted to everybody in September of 2021. Our
4 argument separate from that is that -- again, this goes to the
5 legal issue of whether or not this information is property --
6 the reason why I have raised the rules of the road and some of
7 the arguments that we made -- and I understand your Honor's
8 point about why you were saying what you were saying -- is that
9 this does go to the level of culpability and the nature of the
10 offense here under 3553(a), that's the only reason why I'm
11 raising this. I'm not suggesting that Mr. Chastain believes
12 that he should have done what he did. He is going to tell you.
13 And we have conceded that, I conceded it in opening, your
14 Honor, I said to the jury, you may think this is a little
15 sketchy. And he's not standing here today, your Honor, to say
16 I did nothing wrong, absolutely not. The question is whether
17 from -- and again, preserving arguments -- whether this was a
18 crime under the wire fraud statute, that's a different point.
19 But what Mr. Chastain did, which he acknowledged, I think, in
20 some text that was ethically brave and, in retrospect, probably
21 not, you're going to hear that today. So I want to be very
22 clear on that, your Honor. And I apologize if I presented any
23 alternative view.

24 THE COURT: Okay. Go ahead.

25 MR. MILLER: Let me move on to deterrence.

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1 First, there is no need here for a sentence that
2 somehow is an incarceratory sentence to provide specific
3 deterrence.

4 THE COURT: Let me interrupt you. I agree with that.

5 The question is general deterrence. In particular, my
6 impression, both anecdotally and I think there's some empirical
7 support for this, is that in the context of these kinds of
8 prosecutions, white collar prosecutions, insider trading
9 prosecutions, that this is an area where these prosecutions and
10 sentences do have a deterrent effect on participants. This
11 case has received some attention in the press. It, I guess,
12 will receive attention, whatever sentence I impose. Does that
13 not matter and does it both undermine the deterrent effect and
14 breed cynicism or look of respect for the law if Mr. Chastain
15 is perceived as getting a slap on the wrist?

16 MR. MILLER: No, I don't think so, your Honor. I
17 think at this point anybody would be hard pressed to say
18 whatever sentence your Honor imposes -- we hope it's time
19 served or probation with a condition of home confinement,
20 something we have suggested in our papers -- I think anybody
21 who knows and has read the press on this or knows what this
22 case is about knows -- especially considering, frankly, the
23 amounts involved, right, this wasn't millions of dollars or
24 anything like that -- knows that if you even, to a small extent
25 might try to replicate Mr. Chastain's behavior, here is what's

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1 going to happen to you, your reputation is going to be
2 irreparably damaged, you're going to get fired from your job,
3 you're going to lose potential to vest in shares that are worth
4 millions of dollars, and you are going to have a hard time
5 getting another job, not to mention the fact that you are going
6 to be constantly scrutinized in the press. And then you are
7 going to have to go through a prosecution by the United States
8 Attorney's Office for the Southern District of New York, which
9 nobody wants to go through.

10 So I don't think just because of the fact that the
11 government has decided to charge this case, because it involved
12 novel technology and non-fungible tokens and, as we just heard
13 earlier, sexy products, that all of a sudden now that means
14 that Mr. Chastain should be treated more harshly than other
15 defendants because the government is trying to make a point in
16 this new area of technology that it is attempting to enforce
17 its laws in. I make that argument a little harsher with the
18 SEC, I know why the United States Attorney's Office is doing
19 what it is doing, I think that would be frankly the wrong way
20 to look at this, your Honor.

21 I mean, the government declared this when it charged
22 this case, as the first ever criminal case involving the
23 so-called insider trading of digital assets. And as we just
24 sort of discussed here, every significant moment of this case
25 has been covered. And I think anybody who is viewing this and

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1 is seeing now that Mr. Chastain was convicted after a trial,
2 not to mention all the reporting that's been going on,
3 understands that, even for the amount that was involved, they
4 don't want any part of this. I think if your Honor
5 appropriately provides a noncustodial sentence, that means that
6 all of a sudden the general deterrence in this new space goes
7 out the window, I don't think that's true.

8 And I'll note this, Mr. Chastain, as I sort of
9 referenced earlier, shouldn't be penalized for the fact that
10 this involves new technology, which brings me to the need to
11 avoid unwarranted sentencing disparities. And this is, I
12 think, your Honor's sort of first point on your order today
13 about whether there's a comparable case here. There isn't.
14 And the cases that I think the government just sort of
15 discussed with your Honor at the very beginning, tipping cases,
16 as your Honor appropriately pointed out, are apples and
17 oranges.

18 In the situation where you have a tipping case, the
19 tipper, even if they make no money, if they're tipping a friend
20 or a family member as Dirks and its progeny and Martoma talked
21 about, it is as if the insider trading on that information,
22 taking the cash and giving it to their family member or
23 friends, which is why they're on the hook and responsible and
24 should be responsible for the overall gain amount. And I think
25 we noted in pages 21 to 23 of our sentencing submission and

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1 pointed out cases with much larger gain amounts, where the
2 defendants got noncustodial sentences, including in the insider
3 trading context, or much lower sentences than the government's
4 request. And just because this case involves NFTs doesn't mean
5 now that Mr. Chastain should suffer from getting a
6 disproportionate sentence. So I think that's important to note
7 for your Honor.

8 If I may I would like to finish the remaining factors
9 and then talk about forfeiture. I'm sorry, there was one other
10 point I wanted to mention. The government points to the Ishan
11 Wahi case to argue that a sentence within the 21 to 27 range is
12 appropriate. As the Court may be aware, I was Mr. Wahi's
13 counsel. That case was much different factually and no
14 unwarranted disparity would be created through our request
15 for Mr. Chastain here. The indictment allegations in both
16 cases speak for themselves. And of course, the amounts
17 involved and the facts involved are different and the
18 government knows that. Just because they alleged, quote,
19 unquote insider trading involving digital assets or crypto
20 doesn't make the cases necessarily similar.

21 And it bears mentioning that what the government
22 didn't tell your Honor in that submission is that Judge Preska
23 did vary below the guidelines in imposing the sentence that she
24 imposed, which was 24 months, which was a significant variance
25 from the guidelines that were computed and adopted by the Court

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1 in the PSR, significant variance. So the cases are apples and
2 oranges and that comparison deserves no moment, no
3 concentration on it whatsoever. And it only is brought up
4 because that's the other insider trading case involving crypto
5 that they charged in the last year.

6 On the forthcoming amendments point, I appreciate your
7 honor has applied, intends to apply the 4C1.1, or did apply the
8 4C1.1 in computing the offense level. We would still like to
9 reference that the forthcoming guideline 4C1.1 does note that a
10 nonincarceratory sentence could be appropriate in this
11 situation, and we mention that in our submission.

12 THE COURT: The government responded to that in a
13 footnote and says that it doesn't apply because the commission
14 views this offense as a, quote, unquote serious offense and
15 therefore that provision doesn't apply. Do you take issue with
16 that?

17 MR. MILLER: I do. I take greatly. I'm not saying
18 that the offense -- one doesn't look to the name of the offense
19 or the statute in determining whether or not a crime is serious
20 under that assessment. If that was the case, then almost every
21 crime would be serious, warranting time of incarceration. So
22 we take issue with that.

23 I'm not going to go through -- I think your Honor has
24 our letter from yesterday and argument and submissions -- it
25 sounds like the government may have backed off the concept of

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1 using any gains from after the work had been featured, and
2 obviously, for the reasons we have already set forth, those
3 should not be included, including from a forfeiture
4 perspective.

5 Finally, I just note --

6 THE COURT: Can I ask you on that -- I don't know if
7 they backed off so much as saw the handwriting on the wall --
8 if I conclude, number one, that those trades are not to be
9 included in the forfeiture order and, two, that the most
10 appropriate way of doing this is to order forfeiture of the ETH
11 itself, do you agree that the total is 15.98, I believe, is
12 what Ms. Nichols said.

13 MR. MILLER: One moment.

14 Yes, your Honor, that's fine.

15 THE COURT: Okay.

16 MR. MILLER: So I had a number of points that I was
17 going to go through about in bringing up certain cases in the
18 Second Circuit and others as to why a money judgment is
19 inappropriate here. If your Honor is inclined to award the
20 forfeiture as the ETH involved, which we think would be correct
21 as a legal matter, I can move on.

22 THE COURT: Move on.

23 MR. MILLER: Thank you, your Honor.

24 So let me close on this, your Honor. Mr. Chastain is
25 a nonviolent, first time offender, convicted in a prosecution

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1 that does involve several novel and, we would submit,
2 substantial legal issues. And other than the underlying
3 factual events here, we submit he has led a blameless and
4 indeed praiseworthy life. He has given himself, all of himself
5 to assist family, friends and others in times of need, and he's
6 made a difference in people's lives. He works hard and is a
7 considerate selfless individual. He is a good human being.
8 And Mr. Chastain has lost a great deal already.

9 He lost a highly lucrative, life-changing job, he's
10 lost his professional reputation and potentially his liberty
11 over an isolated period in the summer of '21 of poor judgment.
12 And given the guideline issues that we've discussed and
13 assessment of the 3553(a) factors and accounting for who Nate
14 Chastain is, we respectfully request that a sentence of time
15 served or, alternatively, a sentence of probation with
16 community service and/or home confinement would be a sentence
17 that is sufficient, but not greater than necessary, to
18 accomplish the sentencing objectives of 18, United States Code,
19 Section 3553(a).

20 Thank you, your Honor. And now, Mr. Chastain, with
21 the Court's indulgence, has a few words to say.

22 THE COURT: Thank you, Mr. Miller.

23 Mr. Chastain.

24 THE DEFENDANT: Thank you, your Honor.

25 I'm here today because two years ago, I let down the

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1 community I was serving and lost sight of the person I aspired
2 to be. I apologize to OpenSea, a company that gave me the
3 opportunities and autonomy to do fulfilling work, a company
4 that surrounded me with team members that inspired me and a
5 company that I poorly represented. I'm sorry for putting my
6 colleagues and friends from OpenSea through this ordeal.

7 In September of 2021, I did my best in the immediate
8 aftermath to communicate how sorry I was. While I do not
9 believe and did not believe I had defrauded OpenSea, I
10 apologized to the founders the night my conduct was being
11 discussed on Twitter in private messages and in all meetings
12 with the OpenSea team and on numerous occasions in the day that
13 followed, so much so that the general counsel joked to our CEO
14 that I was self-flatulating. I had prided myself on resolving
15 problems for the company and I felt awful that I had created
16 one. I am still as deeply remorseful for these actions today
17 as I was then.

18 This conduct was antithetical to my personal and
19 professional values. And so I have undergone a significant
20 amount of reflection and self-auditing over the past two years
21 to ensure a better understanding. While I feel confident that
22 I will never make this mistake again, I am here to own the
23 mistakes I have made in the past.

24 I am focused now on doing right by those around me and
25 helping out where I can. Since June of last year, I have been

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1 working full-time in the product world for a team that has an
2 understanding about my situation. And additionally, I
3 regularly provide feedback and mentorship to other product
4 teams whenever possible. If I find that the path is closed for
5 me to build another product, I'm hopeful that I may be able to
6 guide someone else on their path.

7 Outside of my professional life, I am committed to
8 nurturing and strengthening my personal relationships. Despite
9 losing many relationships due to my conduct at issue here, I am
10 extremely grateful that others were willing to look past my
11 flaws and continue to support me. To that end, I am sorry to
12 my mother and sister for compounding their grief with the
13 stress of these proceedings. I placed an unnecessary burden on
14 them during what was already a trying time. Similarly, I
15 apologize to my girlfriend for complicating our future together
16 through my conduct. She has been an unwavering source of joy
17 and strength in my life and I wish that I had done better by
18 her. I recognize that she and others have had to carry the
19 weight of this case with them and for that I'm deeply sorry.

20 I would like to close by thanking the Court and the
21 jury for their diligence in reviewing the facts of my case.
22 Thank you for your time, your Honor.

23 THE COURT: Thank you, Mr. Chastain.

24 So I don't often do this and don't do it lightly, I'm
25 going to take a short break, in part, candidly, so I can think

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1 about the appropriate sentence here. This is an unusually
2 difficult one. We've also been going at this a while, I want
3 to give the court reporter a few minute break. So why don't
4 you be ready to go in five minutes, and I'll take the bench as
5 quickly thereafter as I can and we'll pick up from there. So
6 I'll see you in a few minutes.

7 (Recess)

8 THE COURT: Counsel, is there any reason why sentence
9 should not be imposed at this time?

10 MS. NICHOLS: No, your Honor.

11 MR. MILLER: No, your Honor.

12 THE COURT: In imposing sentence, I'm required to
13 consider the factors set forth in 3553(a). In the interest of
14 time, I'm not going to recite them in full, but suffice it to
15 say, I have and will consider all of the seven relevant
16 factors, including the guidelines range that we discussed
17 earlier, as modified by the forthcoming amendment on the zero
18 point offender front. Ultimately, I'm required to impose a
19 sentence that is sufficient, but no greater than necessary, to
20 comply with the purposes of sentencing set forth in subsection
21 (a)(2), namely to reflect the seriousness of the offense, to
22 promote respect for the law, to provide just punishment for the
23 offense, to afford adequate deterrence to criminal conduct, to
24 protect the public from further crimes of the defendant and to
25 provide the defendant with needed educational or vocational

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1 training, medical care or other corrective treatment in the
2 most effective manner.

3 Now, as I said before I took a break, I find this
4 sentence unusually difficult. I have said before that
5 sentencing is the hardest thing that a judge has to do.
6 There's a range within that, and I think this one is especially
7 hard for a variety of reasons. On one hand, I am certainly --
8 I, again, think that the verdict was a totally defensible one.
9 And indeed, I think that the only explanation for
10 Mr. Chastain's conduct is both greed and that he knew exactly
11 what he was doing. Yes, there were some ambiguities at OpenSea
12 at the time, it was a relatively new company and not very well
13 lawyered at the time this conduct occurred. I think
14 Mr. Chastain's own conduct, his use of more than two dozen
15 anonymous or synonymous, whatever you want to call it, wallets,
16 his reaction to the Tweets that called him out, his reaction
17 when first confronted by Mr. Viau and Mr. Atallah, I think that
18 makes abundantly clear that he knew exactly what he was doing
19 and he took advantage of an opportunity, fear of missing out,
20 as he himself put it. I think he would be the first to
21 acknowledge that that conduct was profoundly dumb, that the
22 little he gained financially, compared to what he has lost and
23 what he's been through the last couple years, that it really
24 pales in comparison to that. I think that, for those
25 reasons -- whoever is typing in the back, please stop; you are

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1 not supposed to be using electronic devices in here for one
2 thing and, for another, it is distracting -- I do think that
3 respect for the law, deterrence -- not for Mr. Chastain, I am
4 persuaded that he is unlikely to re-offend, but more broadly,
5 that those are factors that warrant a sentence, warrant
6 punishment, and I'll elaborate on what I mean by that in a
7 moment.

8 On the flip side, I do agree that there are a number
9 of mitigating circumstances here that warrant a variance and a
10 substantial variance from the guidelines at that. Now,
11 Mr. Chastain is a first time offender. To some extent I have
12 given him credit on that score already by taking into account
13 the zero point offender amendment. I think, as the letters
14 that Mr. Miller emphasized, made clear -- and were quite
15 eloquent letters -- I think to really quote Mr. Chastain's
16 uncle, a one time bad, dumb act in a lifetime of good, smart
17 acts is sort of a way that I think aptly describes it. They
18 describe someone who is a generous and caring friend, son,
19 brother, talented person that can do good in the world and I
20 think he likely will do good in the world, but somebody who
21 strayed and should have known better, as Mr. Chastain himself
22 acknowledged.

23 Now, third, his prospect of steady employment with the
24 marketable skills suggest to me that Mr. Chastain has a
25 potentially promising future, as exemplified from his current

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1 employer, Mr. Smith and Mr. Hines, who is here today. That is
2 to say, on the one hand, he suffered serious reputation harm
3 and consequences and that will no doubt hamper and dog him for
4 potentially the remainder of his professional life. On the
5 other hand, he seems to have overcome that in some respects,
6 and that's a testimony to his hard work and, frankly, to his
7 integrity, this episode aside.

8 All that persuades me that his lack of remorse
9 notwithstanding -- and I remain concerned and understand and
10 respect that they need to preserve issues for appeal -- but the
11 fact of the matter is, I think Mr. Chastain has admitted to
12 certain portions of his conduct, but not to all of it, and in
13 an effort to maintain his innocence -- as I said before I am
14 fully persuaded that he knew exactly what he was doing here --
15 that notwithstanding, I'm convinced he's very unlikely to
16 re-offend.

17 So where does that leave me? That leaves me
18 struggling to figure out what an appropriate sentence is. And
19 I would say part of that is my concern that I articulated to
20 Ms. Nichols before, which is there aren't so many comparable
21 cases to this. My law clerk did find one where the defendant
22 made \$76,000 in profits and received a five-month sentence in a
23 2017 case before Judge Broderick. That may be the closest
24 comparable case that we were able to find, but the bottom line
25 is there aren't many. And I am somewhat concerned that, but

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1 for the fact that this conduct took place in a slightly sexy
2 new arena, that it might have never been charged by the US
3 attorneys, but that is very different from saying it wasn't a
4 crime, it's very different from saying it doesn't warrant
5 punishment. I think it is a factor to be weighed.

6 All that leads me to the conclusion that a relatively
7 short amount of jail time, but some jail time is warranted, but
8 not as much as probation recommends, certainly not as much as
9 the guidelines would call for. That is not a judgment that I
10 reach lightly, but it's one that, balancing all the
11 considerations, the need to promote respect for the law and to
12 provide adequate deterrence to those that are engaging in
13 conduct in the space, weighing that against the other factors
14 that I described, my confidence that Mr. Chastain has indeed
15 learned a lesson and will not commit that sort of thing in the
16 future, will use his talents for good, not for harm, and that
17 is what I think is the right way to balance them.

18 With that, you may rise. I'll ask you to please rise,
19 Mr. Chastain. I'll state the sentence I intend to impose.

20 Mr. Chastain, it is the judgment of the Court that you
21 will be remanded to the custody of the Bureau of Prisons for
22 three months on each count, to be served concurrently, to be
23 followed by a period of three years of supervised release with
24 a special condition of three months of home detention.

25 During the term of supervised release, you will be

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1 subject to the mandatory conditions set forth on pages 30 and
2 31 of the presentence report. You shall satisfy your financial
3 obligations that I will discuss shortly, including any
4 installment schedule that I impose. In addition, the standard
5 conditions of supervised release, which are set forth on pages
6 31 and 32 shall apply, that includes you may not possess a
7 firearm or destructive device, you shall report to the
8 probation office in the judicial district where you are
9 authorized to reside within 72 hours of your release from
10 custody. And finally, you must meet the special conditions
11 that are set forth on page 32, with the following two
12 additions: Number one, as I said, you shall serve three months
13 of supervised release on home detention, it's to be enforced by
14 location monitoring, and I'll give you the relevant language on
15 that in a moment; in addition, I'm going to require that during
16 your term of supervised release that you perform 200 hours of
17 community service as approved by the probation officer.

18 I want to make clear, as I suggested earlier, that I
19 would impose the same sentence even if I were to have included
20 that Section 2B1.1 is the proper guideline to be applied.

21 I am going to impose a fine, given Mr. Chastain's
22 ability to pay a fine, and I'm going to impose a slightly
23 larger fine than the bottom of the guidelines, in part, because
24 of the forfeiture order I'm going to impose.

25 Let me start with forfeiture. I am going to order

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1 forfeiture of the ETH itself, that is the property derived from
2 the offense. The parties seem to agree that that figure is
3 15.98 ETH. I'm going to ask the parties to try and reach
4 agreement in the terms of an appropriate forfeiture order that
5 makes that clear, but that is part of the sentence.

6 I do think there's an argument that a defendant should
7 be subject to essentially the maximum forfeiture, whether
8 that's at the time of the offense or if it appreciates in
9 value. Bottom line is, to avoid some of those thorny
10 questions, I'm going to order forfeiture of the ETH itself, but
11 as a result of that I'm going to impose a slightly higher fine
12 than I otherwise would have, given the ability to pay here and
13 the rest of the sentence that I imposed. In particular, I'll
14 order that Mr. Chastain pay a fine in the amount of \$50,000 to
15 be paid within six months of the commencement of his term of
16 supervised release, in the first six months of supervised
17 release.

18 And finally, I'm imposing the mandatory special
19 assessment of \$100 per count for a total of \$200.

20 I think this should be clear from the colloquy, but
21 that forfeiture amount is based solely on the trades that
22 occurred before purchases that occurred before the NFTs were
23 featured on the website. I'm excluding the transactions where
24 it went in the opposite order.

25 On the location monitoring front, let me just add

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1 that, Mr. Chastain, you are to be monitored for a period of
2 three months while you are on home detention and must abide by
3 all technology requirements. You must pay all or parts of the
4 costs of participation in location monitoring program as
5 directed by the probation department based on your ability to
6 pay. And I will leave the technology to the discretion of the
7 probation officer.

8 Does either counsel know of any legal reason why the
9 sentence should not be imposed as stated?

10 MS. NICHOLS: No, your Honor.

11 MR. MILLER: No, your Honor.

12 THE COURT: The sentence as stated is imposed.

13 I find that it is sufficient, but no greater than
14 necessary, to satisfy the sentencing purposes set forth in
15 Section 3553(a)(2), including the need to promote respect for
16 the law, provide just punishment for the offense, to afford
17 adequate deterrence -- again, not so much to Mr. Chastain -- to
18 others, to protect the public from further crimes of the
19 defendant. I think that factor does not weigh heavily here.

20 Mr. Chastain, I don't send anybody to prison lightly,
21 and I certainly didn't here for the reasons I articulated. I
22 do think something more than what might be perceived to be a
23 slap on the wrist is appropriate. It's not a particularly long
24 sentence, but nor would I want to spend three months in prison.
25 I didn't do that lightly. I think it is what I deem is the

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1 appropriate thing given what I view as the wrongfulness of your
2 conduct and conduct that I think you knew was wrong. So I
3 certainly understand that you are trying to walk a fine line in
4 terms of the issues that you are preserving for appeal, while
5 acknowledging the ways in which you went astray, but I think
6 that you know in your heart of hearts that you went astray a
7 little bit more than you have acknowledged. Be that as it may,
8 the letters that were submitted to me, your own remarks make
9 clear to me that you are more than this conduct would suggest,
10 and I would hope that after you serve your time and you have
11 paid your debt to society that you are able to use your
12 considerable talents to good use. You will have to, by virtue
13 of the community service requirement that I have imposed, but
14 the letters from your current employer, from Mr. Hines, make
15 clear you still have supporters, not only in your family, among
16 your friends, you should be thankful for all of that, also
17 among people who are willing to take advantage of your talents.
18 I hope that you learned a lesson from this. I hope that you
19 can teach other people the lesson so that they can learn from
20 this and that when you have served your time that you are able
21 to go back to steady employment, that you will do good in the
22 world and not put this behind you -- because you shouldn't
23 forget it, but rather learn from it -- and profit from it in a
24 moral sense, not a financial sense.

25 Now, I would assume that you would request a

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1 recommendation to the Bureau of Prisons for a designation
2 either in the New York City area or in the Massachusetts area.

3 Mr. Miller.

4 MR. MILLER: Your Honor, we request Otisville, the
5 camp at Otisville.

6 THE COURT: I'm prepared to make that recommendation
7 consistent with the maintenance and ties to Mr. Chastain's
8 friends and family. I also do not think that a high security
9 facility is necessary here. Obviously, that's up to the Bureau
10 of Prisons, not up to me.

11 I don't think there are any open counts to be
12 dismissed, unless I'm misremembering.

13 MS. NICHOLS: No, your Honor.

14 THE COURT: Mr. Chastain, to the extent that you --
15 well, you did not give up your right to appeal in any
16 respect -- you have the right to appeal. Any notice of appeal
17 must be filed within 14 days of the entry of judgment. If you
18 cannot afford to pay the cost of appeal, you may apply for
19 leave to appeal in forma pauperis.

20 I am going to grant voluntary surrender. I don't
21 think there's any reason to do otherwise here. Mr. Chastain,
22 let me give you a date in approximately six weeks or so out
23 from now. Mr. Miller, that puts us to, I would say,
24 October 5th.

25 Do you have any reason to say that date is not

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1 appropriate?

2 MR. MILLER: I think Mr. Chastain was hoping to attend
3 a wedding at the end of October, if November 1st is possible.

4 THE COURT: Whose wedding is it?

5 MR. MILLER: His girlfriend's best friend.

6 THE COURT: I don't think a few weeks will make a
7 material difference, so I'll order that Mr. Chastain will
8 self-surrender to the facility to which he's designated by
9 November 2nd, 2:00 p.m. on November 2nd.

10 In the unlikely event that a facility has not been
11 designated at that time, normally, I would say that he would be
12 required to self-surrender to the MDC, but I think that's in
13 nobody's interest here. Mr. Miller, in that unlikely event --
14 first of all, confer with the government and see if you can
15 spur a designation well before then -- but second of all, if
16 you seek an extension of the surrender date, I'm prepared to
17 grant that. Unless or until I say otherwise, you're to
18 surrender by 2:00 p.m. on November 2nd to a facility to which
19 you are designated.

20 Let me stress two things: First of all, you must
21 surrender by that time to whatever that facility is. If you
22 don't, that is a separate offense and would subject you to
23 punishment above and beyond the punishment you received today,
24 I don't expect that to the happen, but do you understand that?

25 THE DEFENDANT: Understood, your Honor.

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1 THE COURT: Second, until that date, the conditions on
2 which you have been released until today will continue to
3 apply. If you violate any of those conditions, number one, it
4 may result in your being remanded sooner to the MDC, which
5 again I doubt you want. But more broadly, you may also be
6 subject to punishment above and beyond what you received today.

7 Do you understand that?

8 THE DEFENDANT: Understood, your Honor.

9 THE COURT: Can I ask, counsel, can you submit a
10 proposed forfeiture order -- hopefully agreed upon -- within a
11 week of today, is that feasible?

12 MS. NICHOLS: Yes, your Honor.

13 MR. MILLER: Yes, your Honor.

14 THE COURT: Anything else from the government?

15 MS. NICHOLS: No. Thank you, your Honor.

16 THE COURT: From the defense, Mr. Miller.

17 MR. MILLER: Yes, your Honor.

18 We have one application, under 18, United States Code,
19 Section 3143(b), we would ask that the Court grant bail
20 pending appeal, given the substantial legal questions involved
21 in this case, your Honor. My understanding is the government
22 takes no position on this.

23 THE COURT: Ms. Nichols.

24 MS. NICHOLS: We don't concede, your Honor, that
25 there's a substantial question, but we defer to the Court on

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1 this question.

2 THE COURT: Mr. Miller, I'm not going to rule on it
3 based on an oral application. Why don't you submit something
4 in writing. You don't need to address 3143(b)(1)(A), which is
5 to say that I don't think there's a danger of Mr. Chastain
6 fleeing or posing a danger to the community. But if you could
7 focus your attention on subsection (B) and why that condition
8 is met. I would at least appreciate a preview of what
9 arguments you would raise on appeal in enabling me to evaluate
10 whether that is met.

11 MR. MILLER: Thank you, your Honor.

12 By when, your Honor?

13 THE COURT: Up to you. He's to surrender by
14 November 2nd. I would obviously give me ample time to give you
15 a ruling, if you want to appeal that ruling, so use your time
16 wisely and keep in mind the government will be entitled to
17 respond as well.

18 Anything else from the defense?

19 MR. MILLER: No, your Honor. Thank you.

20 THE COURT: In that case, Mr. Chastain, I do wish you
21 and your family the best of luck. My condolences on your loss
22 of your brother earlier this year. And we are adjourned.
23 Thank you.

24 (Adjourned)